SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 35 | Issue 5 Article 6

1981

Book Review

BOOK REVIEWS

UNLIKELY HEROES. By Jack Bass. New York: Simon and Schuster. 1981. Pp. 325. $14.95.

Yet they were of a different kind,
The names that stilled your childish play[1]

IN 1967 Judge Wisdom wrote at some length in these pages concerning "the frictionmaking, exacerbating political role of federal courts"[2] in our system of constitutional government. He described that role in unequivocal terms: the federal courts' "function in the body politic is to stand fast at the pressure points where state policies or community customs or the local interests of segments of the people press against national policy."[3] Although Judge Wisdom's thesis is buttressed at every point by unimpeachable scholarship, his views concerning the public law functions of the federal courts obviously were not the product of only theoretical speculation. They were forged in the crucible of a particularly difficult period, when the judges of the Fifth Circuit were required on a daily basis to confront and resolve questions involving the first principles of our system of government.[4] It was a time when individual federal judges and the principle of judicial review were tested as never before.

In 1954, when the Supreme Court decided *Brown v. Board of Education*,[5] the political and social life of a large part of this country was premised upon the view that the police power of the states could properly be invoked to make laws and enforce customs in aid of racial segregation. Almost sixty years before, in *Plessy v. Ferguson*,[6] the Court had held that the practice of racial segregation was not inherently unconstitutional; the fourteenth amendment did not prohibit the maintenance of segregated facilities so long as they were equal in fact.[7] Thus, the question whether

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1. W. Yeats, "September 1913."
2. Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 Sw. L.J. 411 (1967).
3. *Id.* at 423.
4. *See generally* F. READ & L. MCGOUGH, LET THEM BE JUDGED (1978); J. PELTASON, FIFTY-EIGHT LONELY MEN (1961); SOUTHERN JUSTICE (L. Friedman ed. 1965); Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963).
5. 347 U.S. 483 (1954).
6. 163 U.S. 537 (1896).
7. *Id.* at 548, 550. In *Plessy* the Court concluded that they were equal in fact because

> [l]aws permitting, and even requiring [the separation of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of state legislatures in the exercise of their police power.

Id. at 544.

racial segregation should be recognized as official government policy was left for the states to resolve according to their ordinary democratic processes. At the same time, blacks were effectively excluded from the franchise in a large number of states.[8] This exclusion not only prevented blacks from participating in the decision whether segregation should be enforced by law, but it also deprived them of the political power necessary to assure the actual equality of whatever separate facilities might be provided for them.[9] Although segregation and discrimination were inextricably intertwined, it was the Court's decision in *Plessy* that provided some measure of doctrinal legitimacy for the larger system of race relations.

The Court's decision in *Brown* served notice upon an entire region—a large part of which was within the geographical boundaries of the Fifth Circuit—that its institutions were in irreconcilable conflict with the nation's fundamental law. Nevertheless, the practical effect of the *Brown* decision was not at all certain. First, the question remained whether the states would adhere voluntarily to the Court's view of the Constitution. Secondly, the question remained whether the executive and legislative branches of the national government—and the lower federal courts—would support the Court's holding if state and local officials refused to comply. The stage was set for high drama. In the decade that followed, the district and circuit court judges of the Fifth Circuit repeatedly would be asked to give effect to the *Brown* decision, not only in the face of massive resistance by state and local officials, but also with minimal assistance from the executive and legislative branches of the national government. Many of these judges, the "unlikely heroes" of Bass's book, stood firm in giving effect to the Supreme Court's understanding of the Constitution, despite great personal abuse and intimidation. It would be difficult to conceive of an uninteresting book based upon the unprecedented events of those years, and surely few stories are of greater importance in our nation's legal history. In *Unlikely Heroes* Jack Bass has made this story accessible to a general audience, and his book merits a wide readership.

At the outset, Bass has provided an introduction to the workings of the federal courts designed to give the general reader the technical background necessary for following the intricacies of the story. Although lawyers will find at least parts of this account oversimplified, they also will recognize that it contains one of the most critical facts in the book. As Bass correctly points out, "[b]ecause the Supreme Court reviews only 2 to 3 percent of the rulings by the courts of appeals, [the] decisions [of the courts of appeals] usually become the definitive interpretation of federal statutes and constitutional provisions in the states" (p. 18).[10] Just as the criminal justice sys-

8. United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss 1964), *rev'd*, 380 U.S. 112 (1965); United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965); Gomillion v. Lightfoot, 167 F. Supp. 405 (M.D. Ala. 1958), *rev'd*, 364 U.S. 339 (1960). *See also* F. READ & L. MCGOUGH, *supra* note 4, at 281-321.

9. *See, e.g.*, 2 G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO SOCIAL STRUCTURE 580-82 (1964).

10. *Cf.* McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 785

tem is based on the premise that most people will obey the law voluntarily, the system of Supreme Court review presumes that the courts of appeals will follow the Supreme Court's holdings faithfully, not only in cases that are factually indistinguishable, but also in cases that warrant similar treatment because they involve the same principle.[11] If a circuit court repeatedly chose not to follow the Supreme Court's lead, the system could well collapse because of the limited resources available to the Supreme Court to keep that circuit court in line. Thus, the *Brown* decision might have been nullified if the Fifth Circuit had balked, either by refusing to follow the decision at all, or by giving it the narrowest possible effect, which would have required the Court itself to reject every conceivable point of distinction. Not only would such approaches have been applauded by many of the judges' neighbors, but they also might have been approved by the executive and legislative branches of the national government, whose support for the Supreme Court's decision was neither immediate nor enthusiastic. As Judge Wisdom wrote in 1967:

> In civil rights cases the problem of enforcement is far more difficult than the problem of legislative or judicial definition. In most of these cases we are concerned with nationally created rights that are attributes of the national citizenship recognized in the Civil War amendments, including the neglected thirteenth amendment. The responsibility for protecting those rights lies with the nation—with all three of the coordinate branches of government. But until Congress adopted the Civil Rights Act of 1964 and the Voting Rights Act of 1965, statutes with teeth, Congress and the executive had not acted affirmatively to enforce these rights of national citizenship. This left it entirely to the judiciary, the branch of government least able to carry out enforcement in a reasonable time and on a national scale.[12]

Bass recounts two episodes that demonstrate the truth of this observation. First, Bass recalls a speech that Senator Eastland delivered in August 1955 to a cheering audience at Senatobia, Mississippi. Eastland stated: "On May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided that integration was right. You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it." (p. 17)[13] He was not alone. On March 12, 1956, some 101 southern Senators and Members of Congress issued the so-called "Southern Manifesto," which denounced the Supreme Court's decision in *Brown* as "a clear abuse of judicial power [that] climaxes a trend in the Federal judiciary undertaking to legislate in derogation of the authority of Congress and to encroach upon the reserved rights of the states and the people."[14] The approach of the executive was

(1981) (stating the federal judicial system as currently existing provides a manageable system for the Supreme Court to supervise).

11. *Cf.* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 97 (1960) (highlighting the rate of inconsistency among judicial decisions).

12. Wisdom, *supra* note 2, at 424.

13. Bass cites LOOK, Apr. 3, 1956, at 24, as the source for this quote.

14. F. READ & L. MCGOUGH, *supra* note 4, at 62-63.

more circumspect, but, at least on the surface, no more helpful.[15] In 1956, when the twelve black high school students of Mansfield, Texas, yielded to intense intimidation and gave up their struggle to be enrolled at the local white high school, rather than be bused forty miles each day (originally at their own expense) to the nearest black high school, President Eisenhower stated at a press conference that the matter was merely a local responsibility (p. 122).

Whatever the true feelings of the majority might have been in the Southern states, it was the voice of those who opposed desegregation that was heard the loudest. By the late 1950s, as the historian C. Vann Woodward has noted, "[a] 'moderate' became a man who dared open his mouth, an 'extremist' one who favored eventual compliance with the law, and 'compliance' took on the connotations of treason."[16] Given the disproportionate power then wielded by Southern Senators and Congressmen, neither the President nor the Congress could repudiate what was thought to be the majority will of the Southern states without alienating powerful political interests. The lower federal courts were left to grasp the nettle.[17] That the Fifth Circuit was comprised of so many judges equal to the task is, perhaps, the most remarkable part of this story.

In researching *Unlikely Heroes*, Bass interviewed many of these judges and obviously developed great respect for them. His sketches of the major characters are not unflawed. He includes, for instance, a certain amount of utterly irrelevant personal information. Not even the staunchest of Judge Wisdom's admirers possibly could care what kind of tie he wore on the day that Bass happened to interview him (p. 53); nor could anyone possibly be interested that Judge Tuttle lunched on yogurt and cheese-flavored crackers with peanut butter "[a]fter he took senior status" (p. 53). Nonetheless, the author includes much factual information concerning the backgrounds of these men that does help to explain why they acted as they did. Many readers already will know that Judge Tuttle argued the landmark Supreme Court case of *Johnson v. Zerbst*,[18] while practicing as a tax lawyer in Atlanta, but fewer will be familiar with the extraordinary story of how he came to represent John Downer, a black man who had been accused of raping a white woman. As a Georgia National Guard officer, Judge Tuttle commanded a unit that prevented a mob of 1500 people from lynching Downer five days before his indictment. On the day following Downer's indictment, he was tried, convicted, and sentenced to death by electrocution. Tuttle also was present at trial, having been assigned by the Guard to maintain order. After the trial, he emerged as Downer's counsel,

15. Although President Eisenhower did not take a consistently strong stand on civil rights issues, he appointed numerous federal judges who did (*see* pp. 149-55).

16. C. WOODWARD, THE STRANGE CAREER OF JIM CROW 154 (2d rev. ed. 1966).

17. In addition to the Fifth Circuit, the judges of the Third, Fourth, and Eighth Circuits were required to decide important civil rights cases during this period. Bass's failure to draw, for comparative purposes, upon the experience of those courts is somewhat puzzling. If he had done so, *Unlikely Heroes* surely would be a richer book.

18. 304 U.S. 458 (1938). *Johnson* established the standard for a valid waiver of constitutional rights.

filing a successful habeas corpus petition in federal court because of allegations of "mob domination" (pp. 35-37).

The term "sui generis," which Bass uses to describe Judge Wisdom (p. 50), might appropriately be used, as Bass's sketches demonstrate, to describe Judge Rives, Judge Tuttle, and Judge Brown, his colleagues on the court of appeals. The same phrase would fit Judge Christenberry, Judge Johnson, Judge Simpson,[19] and Judge Wright, who, among others, displayed great courage on the district court bench, where they not only had to act without the opportunity for reflection available to appellate judges, but also were more immediately the target of local pressures. These men easily could have played to the crowd and appeased the will of a transient majority, instead of upholding the Constitution, as they were bound by oath to do. They might well have joined Judge Cameron in his adherence to " 'the universal conviction of the people of the [South] that the judges who function in this circuit should render justice . . . against a background of, and as interpreters of, the ethos of the people whose servants they are.' "[20] But they were ill-suited for such a role.[21] The character of these men is well exemplified by Judge Rives's response to a *Time* magazine report that he had once found his son's gravestone painted red and the grave littered with garbage. *Time* editorialized that this episode showed how Judge Rives had been "honored by his fellow Alabamians" (p. 79). Judge Rives replied in a letter to the editor that "whoever committed such an atrocity must have been mentally ill" (p. 79). He added: "Certainly it should not be charged to my fellow Alabamians, the overwhelming majority of whom are as fine, decent, and fair-minded people as can be found anywhere" (p. 79). These judges developed neither rancor nor irresolution.

Bass also discusses the roles of the Justice Department (pp. 136-71) and the private bar (pp. 286-96), as well as the effect upon the Fifth Circuit of Judge Cameron's charges of "panel-rigging" (pp. 231-47)[22] and the much later nomination of Judge Carswell to the Supreme Court (pp. 318-23).[23] The major part of *Unlikely Heroes*, however, consists of a factual account of the principal cases that the judges of the Fifth Circuit were required to decide during this period. Bass has dug deeply into the historical background of these various controversies and has done a creditable job of weaving together the disparate strands of the story. This book will no

19. *See* SOUTHERN JUSTICE, *supra* note 4, at 187-213.

20. United States v. Wood, 295 F.2d 772, 788 (5th Cir. 1960) (Cameron, J., dissenting) (citing Boman v. Birmingham Trust Co., 292 F.2d 4, 28-29 (5th Cir. 1961)).

21. The title of this book is somewhat paradoxical, especially in view of Bass's sketches of the principal characters. Obviously, Bass means to suggest that these men are "unlikely heroes" because judges do not normally come to be considered as heroes. Certainly, nothing in the varied backgrounds of these men warrants the conclusion that their heroism was "unlikely."

22. Bass's account of Judge Cameron's charges is perhaps the least satisfactory part of the book, in part because there is insufficient information currently available to form any conclusion as to what actually happened. *See also* F. READ & L. MCGOUGH, *supra* note 4, at 266-79.

23. *See* R. HARRIS, DECISION (1971).

doubt be compared to *Simple Justice*,[24] Richard Kluger's excellent account of the protracted litigation leading to the Supreme Court's decision in *Brown*, but such a comparison is not wholly fair because Kluger's subject has greater natural coherence than does the subject matter of Bass's book. It is one thing for the Supreme Court to develop a fundamental principle in a series of closely related cases; it is something else for the many judges of a region to grapple with the application of that principle in many unrelated cases involving a plenitude of circumstances and institutions. The task that confronted the Supreme Court in *Brown* was, in some sense, easier than that which later confronted the lower federal courts in applying *Brown*, and the task of the lower courts' historian is likewise more difficult. *Unlikely Heroes* is not simply a book about segregation; it concerns most of the forms of discrimination that the mind of man has devised.

The Fifth Circuit was required almost immediately to decide whether the principle of *Brown* was limited to the educational context. On December 1, 1955, Rosa Parks, a forty-one-year-old black seamstress, began the Montgomery bus boycott by refusing to give her seat to a white person while going home from work on a crowded bus. Parks was arrested, convicted, and fined ten dollars. Dr. Martin Luther King, Jr., then a local pastor, attempted to negotiate a settlement on terms that reflected the complex nature of black grievances and aspirations. King suggested seating on a "first come, first served basis" to facilitate the then-existing policy of requiring each race to fill seats from opposite ends of the buses; however, his proposal would have precluded mandatory seating arrangements after the seats had been filled (p. 60). He laid down two further conditions: white bus drivers were to treat black patrons courteously, and blacks were to be hired as bus drivers for routes that served mainly black patrons (p. 60). King emphasized that the black community was not attempting to challenge the segregation law (p. 60). The offer was rejected. King later was convicted of violating the state antiboycott laws, and his home was bombed (pp. 63-64).

On February 1, 1956, four black citizens of Montgomery filed a federal lawsuit, in which they sought declaratory and injunctive relief against the state statutes and municipal ordinances that required racial segregation on the Montgomery buses. Because they claimed that these statutes and ordinances violated the fourteenth amendment to the United States Constitution, a three-judge district court was convened, consisting of Judge Rives, Judge Johnson, and Judge Seybourn Lynne. The question that confronted the court in *Browder v. Gayle*[25] was momentous: Had the *Brown* court actually overruled *Plessy*, or was that holding limited to the field of public education?

By divided vote, on June 5, 1956, the court held unconstitutional both

24. R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

25. 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).

the state statutes and the municipal ordinances.[26] Judge Rives, in an opinion joined by Judge Johnson, held that the "separate but equal" doctrine could "no longer be safely followed as a correct statement of the law."[27] Judge Rives's scholarly opinion noted that the "separate but equal" doctrine "had its birth prior to the adoption of the Fourteenth Amendment in a decision of a Massachusetts State court relating to public schools," that it had been "followed in *Plessy v. Ferguson*," and that the *Brown* Court had "repudiated [the doctrine] in the area where it had first developed, i.e., in the field of public education."[28] Judge Rives also noted that

> [o]n the same day [that the Court decided *Brown*, it] made clear that its ruling was not limited to that field when it remanded "for consideration in light of the Segregation Cases * * * and conditions that now prevail" a case involving the rights of Negroes to use the recreational facilities of city parks.[29]

After citing a number of other authorities, principally cases from the lower federal courts, Judge Rives stated what he thought to be the guiding principle:

> We cannot in good conscience perform our duty as judges by blindly following the precedent of Plessy v. Ferguson, supra, when our study leaves us in complete agreement with the Fourth Circuit's opinion in Flemming v. South Carolina Electric & Gas Co., 224 F.2d 742, appeal dismissed April 23, 1956, 351 U.S. 901, 76 S. Ct. 692, that the separate but equal doctrine can no longer be safely followed as a correct statement of the law. In fact, we think that Plessy v. Ferguson has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery and its police jurisdiction. The application of that doctrine cannot be justified as a proper execution of the state police power.[30]

In a thoughtful and thorough dissent Judge Lynne emphasized the limited nature of the Court's holding in *Brown*, noting that it had not specifically rejected the "separate but equal" doctrine, but had simply held " 'that in the field of public education the doctrine of "separate but equal" had no place. Separate educational facilities are inherently unequal.' "[31] Judge Lynne therefore concluded that

> the Supreme Court [in *Brown*] recognized that there still remains an area within our constitutional scheme of state and federal governments wherein that doctrine may be applied even though its applications are always constitutionally suspect and for sixty years it may have been more honored in the breach than in the observance.[32]

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26. 142 F. Supp. at 717.
27. *Id.*
28. *Id.* at 716.
29. *Id.* (citing Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954)).
30. 142 F. Supp. at 717.
31. *Id.* at 720 (quoting Brown v. Board of Educ., 347 U.S. 483, 495 (1954)).
32. 142 F. Supp. at 720.

Here was a case, Judge Lynne suggested, in which the record showed that the facilities provided for the two races were "not only substantially equal but in truth identical."[33] Moreover, conceding that section 5 of the fourteenth amendment gave Congress the power to outlaw segregation in intrastate transportation, Judge Lynne found it "worthy of note that for sixty years [Congress] had not seen fit to do so."[34] Finally, he explained his fundamental philosophical disagreement with the approach taken by Judge Rives and Judge Johnson:

> While any student of history knows that under our system of government vindication of the constitutional rights of the individual is not, and ought not to be, entrusted to the Congress, its reticence to intrude upon the internal affairs of the several states should caution us against doing so where the path of duty is not plainly marked and when we must hold a clear precedent of the Supreme Court outmoded.[35]

Five months later the Supreme Court summarily affirmed[36] the judgment of the district court, thus laying to rest at least the narrow question whether the *Browder* majority had given to *Brown* the same meaning that its authors had intended.

Many of the cases that followed called as much for tenacity and judgment as for scholarship on the part of the judges. In the New Orleans school desegregation case[37] control of the schools was shifted from local officials to the state, and the court was required to strike down wave after wave of state legislation specially tailored to frustrate compliance with the court's orders. Bass gives a good account of this tangled case (pp. 112-35),[38] as he also does with respect to the protracted proceedings concerning the admission of James Meredith to the University of Mississippi (pp. 172-200, 248-58). The *Meredith* case,[39] which precipitated the greatest confrontation between the states and the federal courts, as well as the greatest disharmony among the judges of the Fifth Circuit, is particularly remarkable because the case cannot be said to have presented any novel question of substantive law. The constitutional crisis resulted from Governor Barnett's wilful refusal to comply with the court's orders (in which he was unwittingly encouraged by the Kennedy Administration's willingness to

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33. *Id.*

34. *Id.*

35. *Id.* at 720-21.

36. 352 U.S. 903 (1956).

37. Bush v. Orleans Parish School Bd., 138 F. Supp. 337 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957); Orleans Parish School Bd. v. Bush, 252 F.2d, 253 (5th Cir.), *cert. denied* 356 U.S. 969 (1958); Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961); Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961).

38. *See* F. READ & L. MCGOUGH, *supra* note 4, at 111-68. Many of the cases discussed by Bass, such as the New Orleans school desegregation case, are discussed at greater length by Read and McGough. Although their book is more thorough in many instances, it is much longer and also less well edited. Readers with more than a casual interest in the subject will nonetheless find *Let Them Be Judged* well worth the effort.

39. Meredith v. Fair, 298 F.2d 696 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

compromise),[40] and much of the dissension within the court resulted from having to face novel problems in having its orders enforced.

At least prior to the enactment of the Civil Rights Act of 1964[41] and the Voting Rights Act of 1965,[42] which transformed the role of the federal courts in this area, the greatest problems that the Fifth Circuit faced were problems relating to remedies and the enforcement of their decisions. In this area, the Supreme Court had provided little guidance,[43] and the substantive issues involved necessarily placed the federal courts on a collision course with state and local officials (see, e.g., p. 118). Moreover, as Judge Wisdom has noted, "elected officials generally felt that political necessities required them to build a public record of unwillingness to desegregate without having exhausted all legal remedies—hence, ceremonial appeals, repetitive appeals on issues previously decided."[44] State courts sometimes entered judgments inconsistent with those of the federal courts, thus creating conflicting duties on the part of state and local officials (see, e.g., p. 129). These problems in the administration of justice were exacerbated in those cases that came to the court of appeals from district judges who refused to enforce the circuit court's mandate when their decisions had been reversed.[45] In this sense, as well, the Fifth Circuit was sailing on uncharted seas; the judges had no relevant experience to guide them in guaranteeing that their orders would be enforced because the problem of enforceability was unique, at least on such a broad scale, in American legal history. The Fifth Circuit was required, therefore, to develop procedural innovations for dealing firmly with these problems while also fashioning relief that, as a practical matter, would attain the results required by the Constitution within a reasonable time (see, e.g., pp. 157, 228).

Bass has done well in mastering the early cases. He has done less well with the later material. Beginning with the enactment of the Civil Rights Act of 1964, the political branches of the federal government increasingly became involved in protecting constitutional rights, and the task no longer fell exclusively to the federal courts. Civil rights law also became more complex due to the explosion of statutory and case law during this period. The flimsy arguments supporting the most blatant forms of discrimination were soundly discredited, and the confrontation between state and federal

40. *See* United States v. Barnett, 330 F.2d 369 (5th Cir. 1963), *question certified answered in the negative*, 376 U.S. 681 (1964), *on remand*, 346 F.2d 99 (5th Cir. 1965).

41. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447, 42 U.S.C. §§ 2000a to 2000h-6 (1976)).

42. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).

43. The absence of controlling Supreme Court authority and the fact that the lower courts generally were sitting as courts of equity in these cases also permitted them great latitude in fashioning effective relief. *See* Wisdom, *supra* note 2, at 417, 420-21, 424, 426-27.

44. *See* Frankel, *The Alabama Lawyer, 1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243, 1249-50 (1964); Wisdom, *supra* note 2, at 420; Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 548-49 n.59 (1974).

45. *See generally* Note, *supra* note 4.

courts gradually eased.[46] The later period, however, brought more complicated questions upon which fair-minded people might differ. In wrapping up the story, Bass hurriedly notes some of these changes in the atmosphere in which the courts were functioning (pp. 297-332), but he does not sort them out or grapple with their significance. Bass certainly would have been justified in discussing only the earlier period, but having decided to deal with the later period as well, he has no justification for virtually relegating such cases as *Weber v. Kaiser Aluminum & Chemical Corp.*[47] to footnote status (p. 327).

Bass's unwillingness to grapple with the tough questions presented in the later period perhaps is related to the major flaw in the book, a general reluctance to move from factual description to some analysis of the facts. This flaw is most obvious in his unsophisticated use of the term "judicial activism," which he uses throughout the book without explanation and without any apparent understanding of its sinister overtones. Not only does Bass's indiscriminate use of this term in characterizing the performance of these judges serve no useful purpose, it also casts doubt on his understanding of this material.

Once the Supreme Court had decided *Brown*, the Fifth Circuit's enforcement of that holding, as well as its extension to other areas in which the *Brown* reasoning clearly applied, hardly could be termed "judicial activism." The judges of the Fifth Circuit admittedly were breaking ground because they were required to decide questions that had not been specifically answered before; they were also required to devise new methods for enforcing their judgments. As Judge Tuttle said, however, "I never had any doubt that what I was doing would be affirmed by the Supreme Court" (p. 25). The Fifth Circuit was required to act as it did because, as Judge Tuttle also said, "If we didn't take a step forward in each of these new types of cases that came up under the heading of racial cases, the Supreme Court would have been swamped" (p. 25). When doubt existed as to whether the Constitution afforded relief, as in *Gomillion v. Lightfoot*,[48] the Fifth Circuit did not march forward.

If "judicial activism" appears in this story, it is the activism of those like Judge Cameron who refused to follow the Supreme Court's decision in *Brown* and refused to extend its teaching to other areas that were indistinguishable in principle. In the *Meredith* case, for example, as Bass points out, "[t]he legal issues all had been clearly decided, and Mississippi had no case" (p. 193). Yet Judge Mize found that Meredith had not been denied

46. *See* Wisdom, Book Review, *Rethinking Injunctions*, 89 YALE L.J. 825, 832-33 (1980). *See also* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

47. 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979). In *Weber* a senior white employee challenged his employer's affirmative action plan after the employee was denied training because of his race. The Court upheld the plan, concluding that title VII of the Civil Rights Act of 1964 did not apply to all private affirmative action plans. *Id.* at 209.

48. 270 F.2d 594 (5th Cir. 1959), *rev'd*, 364 U.S. 339 (1960) (holding that the authority of a forum to determine voting boundaries is limited by the fifteenth amendment).

admission to the university because of his race, and Judge Cameron tied up the court of appeals in knots that only Justice Black could cut. If the judges of the Fifth Circuit had taken a less forceful approach, the Supreme Court would have been required not only to desegregate every school district in the South, but also to decide whether segregation was unconstitutional in every specific area in which it was practiced, determining the validity of every conceivable point of distinction. The job might never have been done.

Perhaps it is enough for Bass to have assembled the factual material contained in this book, and to have presented it in a readable fashion. Nonetheless, *Unlikely Heroes* would have been a more valuable book if the author had given more systematic consideration to the two great themes that are implicit in this story: (1) the proper relationship in our federal system between the national government and the states in matters of individual rights, and (2) the proper role of the federal courts in protecting individual rights. Focused in this way, Bass's factual material could have shed considerable light on the contemporary debates concerning civil rights issues.[49]

The nature of our federal system is an important subject today because of renewed interest in the concept of "states' rights."[50] The cases discussed in Bass's book graphically demonstrate why those rights must yield when state interests conflict with individual rights protected by the Constitution. Article VI of the Constitution not only mandates that federal law shall be supreme, but also requires that state and local officials shall swear to uphold the Constitution and laws of the United States. The Constitution also provides that Congress shall have the "power to enforce, by appropriate legislation, the provision of [the fourteenth amendment],"[51] and the Supreme Court long ago held that the fourteenth amendment is a "[limitation] of the power of the States and [an enlargement] of the power of Congress."[52] Views concerning states' rights are often premised upon a false view of the role of the states in our federal system. As Judge Wisdom has written:

> These stresses and strains are peculiar to our unique form of government. They occur because, unlike other federalisms, in the American system states are neither administrative units of a national government nor sovereign members of a federated league. They are indestructible political entities having their own law, own authority, and

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49. *See, e.g., Attorney General Outlines Campaign to Rein in Courts*, N.Y. Times, Oct. 30, 1981, at A1, col. 1. *See also* U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS UPDATE (Nov. 1981); Address by William French Smith, Attorney General of the United States, before the American Law Institute (May 22, 1981); Testimony of William Bradford Reynolds, Assistant Attorney General of the United States, before the Senate Subcommittee on Separation of Powers (Oct. 16, 1981) (address and speech on file at the offices of *Southwestern Law Journal*).

50. *See* sources cited in note 49 *supra* and MacKenzie, *The Urge to Kill the Umpire*, N.Y. Times, Dec. 3, 1980, at A30, col. 1.

51. U.S. CONST. amend. XIV, § 5.

52. *Ex parte* Virginia, 100 U.S. 339, 345 (1879) (the fourteenth amendment's equal protection clause prohibits local judges from excluding blacks on jury lists).

> own system of courts, but subordinate to the federal sovereignty in all matters of national concern.[53]

Invocation of the term "states' rights" provides no answer to conflicts between state interests and individual rights; it can only describe part of the values in controversy.

A second contemporary theme concerns the role of the federal courts in protecting personal rights. In particular, efforts are under way to curtail the jurisdiction of the Supreme Court in certain instances.[54] The point that is often lost on those who object to the role of the courts in constitutional adjudication is that the purpose of a written constitution, and particularly one that contains guarantees of individual liberty, is to restrain majoritarian excesses. Ours is not a pure democracy in the sense that the will of the majority is supreme. One may question the wisdom of particular decisions that the federal courts have made, but one cannot object to the principle of judicial review without abandoning the notion that certain inherent values of national citizenship are beyond the power of the majority to abrogate, short of constitutional amendment. Absent judicial review, as Tocqueville recognized long ago, "the Constitution would be a dead letter."[55] There is much talk at present that the courts should defer to the popular branches of government, but the framers of the Constitution understood that politicians who hold their offices at the pleasure of the majority cannot always be expected to enforce the rights of the minority vigorously against the will of the majority. In *Cooper v. Aaron*[56] the Supreme Court said: "*Marbury v. Madison* . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[57] Whatever might be the limitations of this principle, no better one has yet been devised.

Throughout the 1950s and the early 1960s the federal judiciary, including the judges portrayed in this book, was required to stand alone in defending the rights of national citizenship that the Constitution had long before conferred on black Americans. In the 1960s, the executive and legislative branches joined the fray, and the nature of the enterprise was changed because the law of the Constitution was reinforced by the will of the majority. Without the early work of the federal courts, however, that second phase might not have come to pass or, at least, it might not have come to pass as early or as peacefully as it did. As Professor Fiss has

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53. Wisdom, *supra* note 2, at 411-12.

54. Proposals pending before Congress to curtail the courts in personal rights cases illustrate the conflict. *See* Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Kaufman, *Congress v. The Court*, N.Y. Times, Sept. 20, 1981, § 6 (Magazine), at 44. For a collection of views on limiting federal court jurisdiction, see 65 JUD. 177 (1981). *See also* Weinreb, *Judicial Action*, N.Y. Times, Feb. 3, 1982, at 27, col. 1.

55. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 151 (P. Bradley ed. 1945).

56. 358 U.S. 1 (1958).

57. *Id.* at 18; *see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

written, "It was not reasonable to expect the judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations—they fought the popular pressures at great personal sacrifice and discomfort."[58] There is a good story between these covers, and one that is timely told.

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58. O. FISS, THE CIVIL RIGHTS INJUNCTION 90 (1978).

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CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION. By Charles Fried. Cambridge, Massachusetts: Harvard University Press, 1981. $14.00.

CHARLES Fried, who has written a fair amount at the intersection of philosophy and jurisprudence,[1] now has produced a systematic theory of the foundation of contractual obligation and the internal structure of contract law. In a nutshell, he argues: (1) that contracts are promises, (2) that this fact about contracts, together with the entailed fact that keeping contracts is prima facie the moral thing to do, accounts for their enforceability at law, (3) that many prominent features of contract law are explainable in terms of the fact that contracts are promises, and finally (4) that other prominent features of what lawyers call "contract law" must be explained in terms of noncontractual legal theory.

Fried's fundamental view will come as no surprise to most laymen. Most lawyers in the fourth quarter of the twentieth century, however, will regard it not merely as innovation but rather heresy; the received doctrine of the time is that contracts are enforced, not because they are promises or because of their moral quality, but because they facilitate economic efficiency or some other social policy (pp. 5, 30, 84, 100).[2] In fact, Fried's view is perfectly sound, at least at its core.

This review elaborates Fried's account of promises, his account of the source of contractual obligation, and his account of the nature of contract law; further, it makes some critical observations about the non-core aspects of Fried's theory. The book includes a number of lucid discussions of classic contracts cases. Unfortunately, space prohibits discussion of them here.

I. THE NATURE OF PROMISES

A promise is a conventional device, often verbal, by which people make future acts obligatory by free exercises of their volition. The basic philosophical question about promises is this: Why are promises, morally speaking, binding? According to Fried, this question cannot be answered until the context of justifying an individual promise and the context of justifying the practice of promising are distinguished (p. 12).[3] In the former situation one wonders why this or that particular promise should be kept. In the latter one asks why we should have the institution of promising at all.

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1. C. FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE (1970); C. FRIED, RIGHT AND WRONG (1978). Professor Fried teaches contract law and legal philosophy at Harvard Law School.

2. *See* P. ATIYAH, PROMISES, MORALS, AND LAW (1981).

3. *See* Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3 (1955); Quinn, *Practice Defining Rules*, 86 ETHICS 76 (1970).

According to Fried, the practice of promising is justified because it expresses the liberal, and correct, ideal of man and the state. The cornerstones of liberalism are individual freedom, individual autonomy, and individual self-realization (pp. 7-8). According to liberalism, people should be secure in their property so that from this sure foundation they may express their wills and expend their powers in the world, thereby creating what they choose and inventing lives that are in accordance with their own lights. Everything but other people must be available to and subject to human will. Other people are exempt from subjugation precisely because they are people. Nevertheless, we all may serve one another's needs freely, and if given the opportunity, that is precisely what reasonable people will do for one another.

People will serve each other freely, however, only if they trust one another. It therefore behooves communities of individuals to build trust. Writes Fried:

> When my confidence in your assistance derives from my conviction that you will do what is right (not just what is prudent), then I trust you, and trust becomes a powerful tool for our working our mutual wills in the world. So remarkable a tool is trust that in the end we pursue it for its own sake; we prefer doing things cooperatively when we might have relied on fear or interest or worked alone (p. 8).

According to Fried, the practice of promising gives trust its sharpest and most palpable form. If promises are regularly made and regularly kept, trust cannot help but rise. For this reason the practice of promising is justified: trust is an intrinsic value, and the practice of promising enhances trust.

While the practice of promising is justified by its consequences, the moral force of individual promises is accounted for in terms of fairness. Says Fried:

> An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust (p. 16).

It is important to notice what is *not* involved in accounting for the moral force of promises. Promises are not obligatory simply because other people have relied on them. Furthermore, from the moral point of view, promise-keeping is not obligatory merely because the promisor has received benefit from the promisee. Both of these conclusions are demonstrable from one simple and unequivocal fact: in the moral world, as in the legal world, promises are binding even if no one has acted on their basis and even if the promisor has yet to receive benefit in exchange for his promise.

II. The Nature of Contracts

Because, according to Fried, the obligation to perform a contract is a special case of the obligation to keep promises, contract law, too, expresses the liberal ideal of man and the state. Contractual obligation is binding because it expresses the will of the parties. Contracts are to be enforced because that is the moral thing to do. This is the classical conception of contract law (p. 1).[4] Thus, the much maligned elaboration of contract theory articulated in the nineteenth century, and now almost universally denounced as "formalism" (p. 132),[5] was importantly right at its core, although it elaborated its central insights in mechanistic and rigid ways.

The practice of contracting, thus, is justified in terms of respect for individual autonomy and in terms of the fact that contractual relations enhance trust in the community. The practice of contracting is *not* to be justified in terms of the fact that smoothly functioning contractual relations contribute to this or that social policy. In particular, the institution of contract is not to be justified in terms of its promotion of economic efficiency, its redistribution of wealth, its enhancement of altruistic interdependence, or any other collective aim society may have (pp. 24-25).

III. Structure of the Contract Law

According to Fried, the fact that contracts are promises explains the major principles of contract law:

> The law of contracts, just because it is rooted in promise and so in right and wrong, is a ramifying system of moral judgments working out the entailments of a few primitive principles—primitive principles that determine the terms on which free men and women may stand apart from or combine with each other. These are indeed the laws of freedom (p. 132).

Thus, contract damages, offer and acceptance, mistake, interpretation, good faith, unconscionability, duress, the duty of good faith performance, conditions, waiver, repudiation, and a variety of other features of the internal structure of contract law are all explainable in terms of principles of promising. Several principles of contract law—one axiom and three relatively unimportant theorems—are rejected by Fried on the grounds of his theory, and rightly so.

A. Damages

If contracts are promises, then the proper remedy for breach is, where possible, expectation damages. Fried apparently believes that giving a promisee what he expected from a breached contract is the way for society to stand behind contracts as the enhancers of trust in the community, perhaps because this damage formula makes the situation as if the contract was not broken. Reliance damages and restitution cannot perform this

4. *See* G. Gilmore, The Death of Contract 40 (1974).
5. *See* P. Atiyah, The Rise and Fall of Freedom of Contract (1979).

function, even though both of them have a role to play in contractual remedies.

Reliance damages are appropriate when the monetary value of expectation is difficult to measure and when "the amount needed to undo the harm caused by reliance is itself the fairest measure of expectation" (p. 22). Restitution, "which holds that a person who has received the benefit at another's expense should compensate his benefactor, unless a gift was intended" (p. 25), is a primitive principle of fairness that is noncontractual in origin because it does not rest upon the will of the promisor. Restitution is the remedy to be applied when something noncontractual goes wrong in an otherwise contractual context. According to Fried, the mere fact that a context is contractual does not mean contract principles alone apply to it:

> There is nothing at all in my conception of contract as promise that precludes persons who behave badly and cause unnecessary harm from being forced to make fair compensation. Promissory obligation is not the only basis for liability; principles of tort are sufficient to provide that people who give vague assurances that cause foreseeable harm to others should make compensation. . . . Justice often requires relief and adjustment in cases of accidents in and around the contracting process. . . , [and] contract as promise has a distinct but neither exclusive nor necessarily dominant place among legal and moral principles (pp. 24-25).

This is one of the more or less peripheral theorems of contract law that Fried rejects.

According to Fried, the principal difficulty with expectation damages is that they can be Draconian. He also believes, however, that doctrines of mistake, impossibility, and the like remove most of this harshness, and he further believes that to fail to enforce a valid contract fully is to fail to take the promise of an adult seriously and thereby to infantilize him and to deny him his full humanity.

B. Offer and Acceptance

According to Fried, the fundamental principles of offer and acceptance follow from the fact that contracts are promises. Promises in general both must be made to someone and taken up by that someone. If I promise a stranger that I will have no more children, then I have not promised to do anything, and I certainly have not promised *him* to do anything; rather, I have made a resolution. In this sense, an exchange must exist in every promise; both the promisor and the promisee must voluntarily participate in the promising relation.

On the basis of this account of the relation of promising, Fried develops a "circuitry" (p. 45) of offer, acceptance, withdrawal, counter-offer, and so forth, which is virtually identical to contract law as we know it. The Mailbox Rule, traditionally a difficult case, which provides that a contract is formed when the acceptance is posted, is "a rule of convenience, allocating the risks [that acceptances will be delayed or will miscarry] in the absence of an allocation by the parties" (p. 52).

C. *Reliance on an Offer*

On the basis of his theory of offer and acceptance, Fried develops an account of the law of reliance on an offer. He argues that because the offeror is the master of his bargain and hence can condition it any way he chooses, no problem exists if *A* says to *B*, "I will pay you if and only if you complete such and such a task." So long as *A* is not tricking *B*, no *contractual* problem prevents *A*'s withdrawing his offer before *B* completes performance. Of course, if *A* is benefitted by *B*'s partial performance, he is obligated to pay restitution. If *B* merely has relied upon *A*'s offer and incurred expenses, but has conferred no benefit upon *A*, then in some contexts reliance damages might be appropriate, founded upon tort principles; in other situations, for example, where *A* has told *B* that he proceeds at his own risk until completion of the task, reliance damages would not be in order. The situation in which a subcontractor makes an offer to a contractor and that offer is included in the contractor's bid is somewhat different. Fried argues that the contractor has in fact accepted the subcontractor's bid by assenting to it (pp. 55-56). Thus, this situation is not mere reliance on an offer but a full-fledged contract.

D. *Gaps and Mistakes*

Problems arise when parties have not agreed on something, and perhaps have not even thought about it, or when their apparent agreement was predicated on a mistake they both made. According to Fried, courts should—and do—try to determine what rational parties would have agreed to had they thought about it. This sort of hypothetical inquiry by the court is in reality an attempt to determine what is fair. Such determinations, however, are not within the purview of contract law per se, because they do not look only to the autonomous wills of the contracting parties.

This departure from contractual principles made classical contract theorists uncomfortable, so they devised ersatz contract principles by means of which to mask what was really happening. These principles are the doctrine of presumed intent and the objective theory of interpretation. Neither of these theorems is consistent with the view that contracts are binding precisely because they are promises, however. In order to determine what a man's promise is, we must look to what he actually intended, not what he might have intended. Furthermore, we must look at the language he used in the context in which he used it, rather than as similar language is used by the community at large. Hence, these two principles—venerable though they are—must be rejected.

While Fried's view appears to imply that unilateral mistakes undermine contractual liability, according to Fried it does not. Strictly speaking, perhaps, a completely executory promise predicated on a unilateral mistake might not be binding. In the context of contract law, however, such promises are taken to be binding for two noncontractual reasons. First, if one of two innocent parties must bear a risk of loss, then the less prudent

one should have to sustain it. This plausible principle of fairness encourages taking care, clearly a reasonable social goal. Furthermore, if unilateral mistake were a defense to contractual liability, the possibilities for defense-by-afterthought would multiply enormously. Thus, for reasons of adminstrative and litigative propriety, unilateral mistakes are eliminated as defenses, and contractual obligation is preserved.

E. Gaps and Losses

Other questions are presented when the promisor cannot do what he promised to do for reasons completely beyond the control of both parties and never envisaged by either party. The classic rule was that the promisor was bound, and the loss remained where it fell. Fried regards this result as absurd. His view is that such losses should be distributed fairly between or among the contracting parties, because (1) they did not agree that losses would fall totally on the promisor, (2) it is not fair that losses should fall totally on him, and (3) the contracting parties did agree to act in concert and therefore are not strangers to one another. Because they have made that kind of agreement to share, it is reasonable that they should be subject to sharing unanticipated losses.

F. Good Faith, Unconscionability, and Duress

The good faith of the parties, the exchange-balance inherent in the bottom line, and the presence of duress are Fried's touchtones for evaluating the morality (and therefore the binding quality) of the contracting *process*. Such evaluations are not concerned with reordering the substantive results of contracts in the light of this or that social policy, they are concerned only with the bargaining process (pp. 74-75).[6] In this light, good faith at formation is identical to honesty in fact, according to Fried. If a contracting party lies, the contract falls through. That is simple enough. Things are more complicated, however, when issues of good faith arise out of a party's failure to disclose. Fried analogizes these cases to cases of mistake in which not all essential terms are agreed upon; just as in cases of mistake, the distribution of losses depends on noncontractual considerations such as fairness.

Good faith also connotes good faith in performance. Thus, for example, the promisor in an output contract may not curtail operations except in good faith, even though the actual contract does not speak to this issue. According to Fried, the duty to perform in good faith is contractual in nature. In order to see this in any given case, one must determine what the promise really is; one must construct a reasonable interpretation of the parties' actual agreement and of their original intentions, against the background of normal practices and understandings in the relevant kind of

6. The Harvard social theory faculty is becoming process-possessed. *See* J. ELY, DEMOCRACY AND DISTRUST (1980); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); Quinn, *Critical Essay*, 49 UMKC L. REV. 378 (1981).

transaction. The language parties use frequently will fail to cover all contingencies clearly, and the words and concepts actually used certainly will be fuzzy around the edges. One must recognize that language is essentially open-textured. Language as used is not a crystalline, closed logical system. According to Fried, this is true of all natural language, whether legal or not. If I tell my babysitter to teach my daughter a game, I will regard my babysitter as having acted inappropriately if he teaches her to shoot craps, even though I did not tell him expressly not to teach her that game, and even though the language I used was broad enough to cover it. My actual intention, which is what should guide the babysitter, is to be discerned from the context, and not from my words considered *in vacuo*. Thus, the language of such contracts as output contracts must be examined against the context of their formation, and, other things being equal, such language contains implied promises not to shut down.

Duress is unproblematic; it is defined as a threat to do wrong to, *i.e.*, to violate the rights of, a promisor. Promises thus extracted are without moral force. Clearly, duress corrupts the contractual process and negates obligation.

G. Unconscionability as a Species of Duress

According to Fried, a contract is unconscionable when the bottom line of the contractual exchange is so lacking in balance as to suggest that impropriety must have existed in the contractual process. Examining a contract for unconscionability should not be construed as a method of achieving substantive social aims, such as a specified pattern of distributing wealth. On the other hand, contract law may not be used as a vindication of bad Samaritanism. Thus, Fried argues that if *A* extracts an extraordinarily high price from *B* for help rendered when *B* is in anomalous distress, the bargain is invalid from a contractual point of view, and *A* is entitled only to restitution. Fried's view, then, is that while individual persons in a political order do not have an individual responsibility to right systemic wrongs, they do have a moral duty not to kick a man while he is down, at least if his being down is a social anomaly. According to Fried, that duty is more fundamental than the obligatory nature of promises, and contract law is overridden by more basic moral considerations. Note that this is not a case of a collectively determined social policy overriding contractual principles.

IV. CONSIDERATION

Fried rejects the fundamental axiom of contract law as we know it, the doctrine of consideration. If the obligatory quality of contracts rests solely on their promissory nature, then consideration is alien to contractual liability. The rejection of consideration is an inevitable result of Fried's theory of contracts, and his rejection of it is well taken. Fried also argues that none of the traditionally accepted justifications for the doctrine of consid-

eration is defensible, and this too seems to be correct (p. 38).[7]

V. CRITICAL OBSERVATIONS

Fried's view seems basically correct. It follows that contract law is shot through with morals and that contract law cannot be assimilated to tort law, the law of fiduciaries, or any general theory of civil liability.[8] Nevertheless, problems with his theory do exist.

Curiously, Fried says very little about contracts that are implied in fact. If Fried's view is correct in its entirety, promises implied in fact (*i.e.*, by the reciprocal dealings of the promisor and the promisee over a period of time), customarily taken to be outside the scope of contract law, should exist. Examples of implied-in-fact contractual promises are difficult to envisage. This suggests an asymmetry between the practice of promising and the contract law that Fried's theory will not countenance.

More importantly, Fried suggests that the practice of promising expresses liberal ideals. If this claim were true, it would follow that promising would be much less important in nonliberal societies than it is in liberal ones. It is not at all clear that this claim is true.[9] If the claim is false, it does not undermine Fried's view of the close relationship between the practice of promising and contract law; it merely undermines Fried's contention that both the practice of promising and the law of contract are expressions of liberal political theory.

Furthermore, according to Fried, contract law is not to be formulated in the service of collective aims, other than the maintenance of the integrity of the practice of promising and the enhancement of trust relationships.[10]

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7. *See* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). Fried seems to acknowledge that Fuller's sophisticated, and reluctant, defensive consideration had some merit, but he also thinks that it either is or will shortly become outmoded by the progress of the law (pp. 39-40).

8. G. GILMORE, *supra* note 4, at 94.

9. On Fried's view one also should expect all lovers of individualism and autonomy to value promises. No such luck. William Godwin, worshipper of both liberty and autonomy rejected the binding quality of promises entirely. *See* D. LOCKE, FANTASY OF REASON: THE LIFE AND THOUGHT OF WILLIAM GODWIN (1980).

10. It is not clear that Fried's justification of the practice of promising in terms of trust-inducement is coherent. Fried draws a distinction between *intrinsic value* and instrumental value. States of affairs are intrinsically valuable when they are sought for their own sake, and they are instrumentally valuable when they are sought for the sake of something which is intrinsically valuable. Thus, Fried supposes that the enhancement of trust in a social setting is intrinsically valuable and that the practice of promising is instrumentally valuable, because "[t]he device that gives trust its sharpest, most probable form is promise" (p. 8). The important point is that the practice of promising is not to be justified in terms of its contribution to social welfare.

Fried's theory has two difficulties. First, it is not clear that the distinction between instrumental value and intrinsic value can be vindicated. If every state of affairs is in fact sought, not for its own sake, but, at least in part, for the sake of something else, then the distinction breaks down, and so does the type of argument that Fried employs. Secondly, even if the distinction between intrinsic and instrumental value makes sense, it is not clear that social trust is a type of state of affairs that is intrinsically desirable. More likely, social trust is sought in order to increase social welfare and to deepen individual self respect. If so, then it is not clear why the practice of promising must be justified in terms of trust inducement, rather than, directly, in terms of social welfare and individual self-respect.

Fried seems inconsistent on this point, because he allows principles springing from other collective aims to override contract principles. For example, he denies that unilateral mistake vitiates contractual liability. In Fried's view, it is the will and therefore the *subjective* state of the promisor and the promisee that are important,[11] yet they are ignored here. According to Fried, promises predicated on unilateral mistake are binding, because of the social policy requiring that the prudent be rewarded and the social policy against opening the floodgates of difficult litigation. Fried admits that the moral principles inherent in the practice of promising, and therefore inherent in the law of contract, are not the only moral principles that exist, or indeed the most important ones. It seems impossible, however, that the principles of promising and of contract law should serve the institution of promising and the integrity of trust exclusively, and at the same time may be overriden *in contractual contexts* by other, collectively determined social policies.

If these comments are well taken, they demonstrate that Fried's theory may not be the reflection of liberalism he wishes it to be and that some internal tinkering still must be done. Nevertheless, Fried is on the right track.[12] Contracts are kinds of promises, and that has something important to do with their enforceability. A morally neutral analysis of contract law is not possible. On the other hand, the errors of the last century, at which we now sneer and call "formalistic," are equally to be avoided, as Fried points out.

One final political comment. Fried is uncomfortable about the courts' reordering contractual outcomes in the light of their own substantive views of justice by using the concept of unconscionability. The hard bargain of the slum merchant should not be changed simply because it is hard. That is something worth worrying about, for it could lead to very bad results and warp relations between courts and players in the commercial game. After all, the slum merchant may actually need his "inflated" profit. Fried goes further, however, and argues that no man has the burden of righting injustices that result from past or prevailing social structures, apparently even if he helped sustain them or has benefited from them. Evidently

11. Reference to the subjective intentions of the parties to a contract is, of course, anathema in the 20th century. *See* O. HOLMES, THE COMMON LAW (1938).

12. Not everyone agrees. P.S. Atiyah, in his review of Fried's book, has argued that the resurrection of the liberal theory of contract is wrong-headed. According to Atiyah, contract law must be concerned with questions of distributive social policy and not simply with questions about individual willings. Furthermore, Atiyah accuses Fried of important inconsistency. According to Atiyah, it is impossible both to emphasize the sanctity of individual autonomy and to award damages for unbargained for reliance that occurs in contractual negotiations prior to formation. Finally, Atiyah presents several puzzles for Fried's "New Formalism": first, Atiyah argues that Fried's account of contracts cannot account for consequential damages, since they hinge on unintended consequences; secondly, Atiyah argues that Fried's theory cannot account for why boiler plate provisions of contracts could be binding, as they are not actually intended by either party in any legitimate sense; thirdly, Atiyah suggests that Fried's theory does not account for why expectation damages, or for that matter any damages, amount to the *enforcement* of the contractual promise; and fourthly, Atiyah argues that Fried's doctrine cannot account for the duty to mitigate damages. Atiyah, Book Review, 95 HARV. L. REV. 509 (1981).

Fried believes that such wrongs should be righted by means to which all must contribute, for instance, through taxation. In the abstract this is all very fine, but it reflects a rather pure, and therefore naive, view of the elements of political process. In a political democracy, energies are directed toward changing a systemic injustice by focusing attention upon it in a variety of ways. These focusings are always expenses for someone. Thus, one could argue that the use of substantive (as opposed to procedural) unconscionability that Fried denounces is a legitimate part of the democratic process and the price the likes of slum merchants pay for having a political democracy. This is not a legal vindication of a substantive theory of unconscionability. Fried, however, suggests that a theory of unconscionability that looks to anything but process is inconsistent with a politics that cherishes autonomy. This surely is not so.

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